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No. 88-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, *et al.*,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF INTERVENING RESPONDENT TRUSTCORP, INC.

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AFFILIATED CORPORATIONS

[list pursuant to S.C. Rule 28.1]

TRUSTCORP, INC. AND SUBSIDIARIES

Effective December 31, 1988

I. OHIO

A. Direct Banking Subsidiaries

1. Trustcorp Bank, Ohio

a. Atlas Tours & Travel Service, Inc.

B. Direct Non-Banking Subsidiaries

1. SeaGate Community Development Corporation
2. SeaGate Corporation (South Dakota Corporation)
3. SeaGate Venture Management, Inc.
4. SeaGate Appraisal Services, Inc.
5. Trustcorp Financing Services, Inc.
6. Trustcorp Venture Capital, Inc.
7. SeaGate Management Services, Inc.
8. Trustcorp International Services, Inc.

II. FLORIDA

A. Direct Non-Banking Subsidiary

1. Trustcorp of Florida, N.A.

III. INDIANA

A. Trustcorp of Indiana, Inc.

1. Direct Banking Subsidiaries

a. Trustcorp Bank, Angola, N.A.

b. Trustcorp Bank, Columbus, N.A.

i. SeaGate Capital Management Company

c. Trustcorp Bank, Dunkirk

d. Trustcorp Bank, Goshen

i. Trustcorp Insurance Agency, Inc.

e. Trustcorp Bank, Hartford City

f. Trustcorp Bank, Huntington, N.A.

g. Trustcorp Bank, Indianapolis

h. Trustcorp Bank, Knox

i. Trustcorp Bank, South Bend

i. St. Joseph Safe Deposit Box Company, Inc.

ii. St. Joseph Advertising Company, Inc.

iii. Jefferson Avenue Building Corp.

iv. Capital Credit Company

j. Trustcorp Bank, Winamac

2. Direct Non-Banking Subsidiaries

a. Trustcorp Life Insurance Company (Arizona Corporation)

b. Trustcorp Mortgage Company

c. St. Joseph Insurance Agency, Inc.

IV. MICHIGAN

A. Trustcorp of Michigan, Inc.

1. Direct Banking Subsidiaries

a. Trustcorp Bank, Ann Arbor

b. Trustcorp Bank, Lenawee

c. Trustcorp Bank, Ypsilanti

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BRIEF IN OPPOSITION OF INTERVENING RESPONDENT TRUSTCORP, INC.

CLARIFICATION OF PETITIONERS' STATEMENT OF THE CASE

While intervening respondent Trustcorp, Inc. adopts generally the procedural history of this action as set forth in Petitioners' Statement, it offers a clarification of the orders of the Board of Governors of the Federal Reserve System ("Board") at issue. A more accurate description of the Board's Order in the Sovran Financial

Corporation ("Sovran") matter, than that set forth by Petitioners, is that pursuant to Exemption D of Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843 (1982) ("BHCA"), the Board permitted Sovran to retain indirect ownership and control of Suburban Insurance, Inc., a company that engages in general insurance agency activity, as long as it is only that grandfathered subsidiary (Suburban Insurance), not some other affiliate of Sovran, that conducts the exempted activities. (Pet. at 41a). Similarly, the Board approved MNC Financial, Inc.'s ("MNC") request to retain the insurance agency activities of its subsidiary, American Security Corporation, Washington, D.C., as long as that Company's insurance subsidiary remained a separate non-bank subsidiary and neither MNC nor any other entities within its organization engaged in the exempted insurance activities. (Pet. at 50a).

As to Petitioners' assertion that the D.C. Circuit "misunderstood its obligation" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*See* Pet. at 5), for the reasons that follow, intervening respondent Trustcorp, Inc. respectfully submits that the D.C. Circuit conducted a full and proper *Chevron* analysis and that the Petition, accordingly, should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The D.C. Circuit Understood and Applied the First Step of This Court's *Chevron* Analysis.

The Petition rests upon the unfounded assertion that the D.C. Circuit "failed to apply the mandatory first step of analysis" this Court set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (Pet. at 5). Displeased with the D.C. Circuit's conclusion, Petitioners attempt to shortchange the court by mischaracterizing the nature of its analysis. Reaching for an issue with which to capture this Court's attention, Petitioners obscure the fact that the D.C. Cir-

cuit fully understood and performed its *Chevron* obligation.

This Court's own formulation of the two-step *Chevron* test bears reciting:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the *precise question at issue*. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is *silent or ambiguous* with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43 (emphasis added) (footnotes omitted).

As a prelude to its construction of Exemption D of Section 4(c)(8) of the BHCA, the D.C. Circuit identified "the precise question at issue" as follows: "whether a bank holding company that qualifies for Exemption D rights may be acquired by another bank holding company without losing those rights." (Pet. at 7a). By comparison, Petitioners' characterization of the question raised by the Board's orders as whether Exemption D rights may effectively be *transferred* "from a grandfathered entity to a bank holding company that does not itself qualify for grandfather rights under the statute" (Pet. at 4, 8 n.3) implicitly suggests an expansion of Exemption D rights not, in fact, effected by the Board in the Sovran/MNC orders. (*See* Pet. at 26a-52a). As the Board explicitly noted, the acquisitions at issue meet the

requirements of Exemption D "[a]s long as it is only that grandfathered subsidiary that conducts the activity and not some other affiliate [of the acquiring bank holding company]." (Pet. at 38a).[1]

Having properly defined the "precise question at issue," the D.C. Circuit set forth the *Chevron* test and proceeded, contrary to Petitioners' representations (Pet. at 7), to consider the statutory language and legislative history to determine whether a clear intent of Congress could be discerned. To that end, it began by focusing upon the exact language of Exemption D which Petitioners maintain is dispositive of the precise question at issue. Under Exemption D, "any insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on May 1, 1982" is excluded from the general prohibitions contained in Sections 4(a)(1) and 4(a)(2) of the BHCA. *See* 12 U.S.C. § 1843(c)(8)(D). Petitioners contend that Congress' use of the modifier "the" rather than "a" preceding "bank holding company" manifests Congress' intent that only such grandfathered holding companies themselves could engage in insurance activity and that such rights would be extinguished upon acquisition by a non-grandfathered bank holding company. (Pet. at 7 n.3).

The D.C. Circuit, however, found it unlikely that Congress would signal its intent on the important question of survival of Exemption D rights solely by use of "the" as a modifier and regarded Congress' use of that article

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[1] The Board further explained:

> On two prior occasions, the Board has determined that grandfather privileges under exemption D do not terminate when the grandfathered entity is acquired by another bank holding company, provided the insurance activities continue to be conducted by the subsidiary that actually conducted the activity on the grandfather date and would not be expanded to other affiliates of the bank holding company.

(Pet. at 39a).

to be "a good deal less revealing" on the precise question presented than argued by Petitioners. (Pet. at 12a). It so concluded, in part, based upon a review of the broader statutory language, explicitly considering competing interpretations of another portion of Exemption D which allows a bank holding company that was not selling insurance on May 1, 1982 to exercise grandfather rights if it had contracted by that date to purchase a company that was itself selling insurance. (*See* Pet. at 13a).

While Petitioners maintained that the provision referenced above demonstrates Congress' explicit consideration of the precise question presented and its determination that only in that particular instance could an acquiring bank holding company continue to engage in grandfathered activity,[2] the Board saw no such clarity. Rather, the Board interpreted the provision as addressing whether and when grandfather rights come into existence, rather than what happens to grandfather rights upon future acquisition. The D.C. Circuit agreed that both Petitioners' and the Board's interpretations of the statutory language were "plausible," yet nevertheless concluded that neither interpretation "flows ineluctably from the statute itself." (Pet. at 13a). This is the very type of "traditional" statutory construction analysis contemplated by *Chevron's* Step One.

Re-examining the Act in its concurrence in the denial of rehearing en banc (Pet. at 54a-59a),[3] the panel ma-

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[2] Petitioners' continuing insistence that this provision proves Congress' intent with respect to "transfers" of Exemption D rights, notwithstanding the D.C. Circuit's opinion to the contrary, demonstrates only that Petitioners disagree with the court's conclusion. This provision does not demonstrate that the court failed to undertake the required analysis. (*See* Pet. at 10).

[3] Despite Petitioners' assertion to the contrary (Pet. at 8 n.4), the concurring opinion in the denial of rehearing en banc, authored by the panel majority and pre-dating the order of summary disposition in the follow-on cases, is part of the D.C. Circuit's *Chevron*

jority found even less merit in Petitioners' position that the precise question at issue is answered by Congress' use of the phrase "the bank holding company" in section 4(c)(8)(D) of the Act. The majority noted that Petitioners' reliance on the significance of the word "the" assumes that "*the* bank holding company" refers all the way back to the putative acquiring company referenced in Section 4(a) of the Act ("No bank holding company . . ."). (Pet. at 56a). As a matter of "word parsing," however, the majority found it equally likely that Congress intended "*the* bank holding company" to refer only back to the phrase "*a* bank holding company" as used in the opening passage of Section 4(c)(8), which section speaks of the acquired or target company. (Pet. at 56a). As the majority noted, in that case, "the premise of Petitioners' construction evaporates since 'the' actually equals 'a.'" *Id.*

The majority also observed that Congress used the term "*same* bank holding company" in the statute when it wished to be more specific. (Pet at 56a).[4] For ex-

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analysis. Petitioners can hardly be heard to protest the "relevance" to this petition of the concurrence when they alone invited further clarification by petitioning the court for rehearing en banc. Even if the concurrence in the denial of rehearing en banc were somehow deemed not to be a part of the D.C. Circuit's analysis, it is a part of the record before this Court on the instant petition. It is well-established that the prevailing party below may assert, and that this Court may sustain a judgment in reliance upon, "any ground that the law and the record permit and that will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984). *See United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957). This is true "whether or not that ground was relied upon or even considered" below. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). Thus, Petitioners' contention that the concurrence is somehow not relevant for purposes of the petition for certiorari is without merit.

[4] This is the type of analysis used by the Second Circuit in *Lehman v. Burnley*, 866 F.2d 33 (1989), a decision with which Petitioners also disagree. (*See* Pet. at 12).

ample, as noted by the court, Exemption D limits the use of grandfather rights by requiring insurance sales at any "new locations" to be those "of the *same* bank holding company . . . with respect to which insurance was sold" in 1982. The court noted that such language "surely implies *on its face* that non-grandfathered bank holding companies can merge with or acquire grandfathered bank holding companies without extinguishing grandfather rights." (Pet. at 57a) (emphasis added). Thus, the majority concluded that the specific language of Exemption D not only "cast[s] doubt on whether Petitioners' reading of the statute is compelled, but also on whether it is a reasonable construction at all." (Pet. at 56a-57a).

Continuing to perform the *Chevron* Step One analysis, the majority explained the inconsistency between Petitioners' interpretation of "the bank holding company" and the balance of that phrase, "*or* any of its subsidiaries," in Exemption D. As the majority noted, this language suggests that "a subsidiary can be grandfathered without conferring grandfather status on the parent bank holding company." (Pet. at 57a). Thus, as the majority reasoned, if Congress' use of "the" is significant, so too is its use of "or" which

> could well have been designed to convey the notion that if a nongrandfathered bank holding company purchases either a grandfathered bank holding company or a grandfathered subsidiary and maintains either entity as its own subsidiary (which is what happened in both of the cases [before the D.C. Circuit]) such acquisitions are well within the plain language of Exemption D even if the bank holding company cannot independently qualify.

(Pet. at 57a).

Having concluded that the language of the statute did not provide a definite answer to the precise question at issue, the D.C. Circuit continued its *Chevron* Step One

analysis by turning to the legislative history of Exemption D. The court reviewed the Senate Committee Report, but was unable to find a clear expression of Congressional intent on the issue of whether grandfather rights survive an acquisition. While it found language supportive of a "measured growth of the grandfathered business" and language restricting the transfer of rights within a bank holding organization (Pet. at 13a-15a), the court was unable to conclude that the survival issue had been specifically considered and unambiguously addressed by Congress.[5] Rather, the court concluded on the basis of its *Chevron* Step One analysis that "[t]he statute does not explicitly deal with what happens to grandfather rights once the ownership of the entity holding the rights changes." (Pet. at 16a).[6] It was only at this point, as the court stated, that it "mov[ed] to the second step of the *Chevron* inquiry." (Pet. at 16a).

Petitioners would have this Court believe, contrary to the explicit findings of the D.C. Circuit, that the language of the statute is so plain, that " 'it require[d] some ingenuity to create ambiguity.' " (*See* Pet. at 7 quoting *United States v. James*, 478 U.S. 597, 604 (1986)). In *James*, in contrast with the ambiguous language of

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[5] Petitioners' assertion that "the majority conceded that the words of the statute, if given their literal meaning, make Congress' intent clear" (Pet. at 8) plainly misstates the court's finding. Quite to the contrary, the court found "nothing in either the language or structure of the statute, or in the legislative history, conclusively resolv[ing] this dispute," and stated that it is "untenable to conclude that 'Congress has . . . directly addressed the precise question at issue.' " (Pet. at 15a-16a) (quoting *Chevron*, 467 U.S. at 843).

[6] This conclusion was echoed by the concurring opinion in the denial of rehearing en banc. The majority noted that section 4(c)(8), 12 U.S.C. § 1843(c)(8) "supports the Board's belief that when Congress wrote Exemption D they were focusing on the creation of grandfather rights and not really thinking about what would happen to those rights if the grandfathered company were acquired." (Pet. at 58a).

Section 4(c)(8) at issue here, this Court observed that "Congress rarely speaks more plainly than it has in the provision we apply here." 478 U.S. at 612.[7] Moreover, and also in contrast with the statute at bar, this Court found the legislative history of the statute under consideration to contain "equally broad and emphatic language" demonstrating that "Congress understood what it was saying." *Id.* at 608. Unlike the statute in *James*, however, Congress' intent, if any, with respect to the survival of Exemption D rights is at best debatable, and is certainly not apparent from either the face of the statute or the legislative history. Accordingly, no meaningful comparison between the two statutes can be made.

It is undisputed that express statutory language must be given effect when a statute unambiguously covers the precise question at issue and when the Congressional intent is clear. *See NLRB v. United Food and Commercial Workers Union*, 108 S. Ct. 413, 421 (1987); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Petitioners' efforts, however, to liken the case at bar to those other decisions cited in the Petition as illustrative of this proposition are unavailing. Each case involving statutory construction, like the case at bar, has a host of its own variables, including a different statute, statutory scheme, legislative history and precise question presented. The degree of ambiguity, if any, in a particular statute is peculiar to that statute and, in all but a few arguable cases, not usefully compared with another statute. Accordingly, none of the cases of "statutory construction"

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[7] While Petitioners would have this Court seize on the modifier "the" and find it dispositive of the precise question at issue in the case at bar, the immunity provision under consideration in *James* unequivocally addressed the issue of the government's liability—"No liability of *any* kind shall attach to or rest upon the United States for *any* damage from or by floods or flood waters at *any* place." 478 U.S. at 604 (quoting 33 U.S.C. § 701 *et seq.*) (this Court's emphasis added). As this Court noted, "[i]t is difficult to imagine broader language." *Id.*

cited by Petitioners are remotely dispositive of whether the particular statutory provision at issue is so clear on its face or the legislative intent is so obvious that this Court may conclude that the D.C. Circuit "skipped over the first step of the *Chevron* analysis." (Pet. at 7).

For example, Petitioners cite *ETSI Pipeline Project v. Missouri*, 108 S. Ct. 805 (1988), as support for the proposition that the alleged unambiguous, express language of Exemption D covers the situation at issue and must be given effect. (Pet. at 11) The comparison, however, is misleading at best.

The question presented in *ETSI* was whether the Secretary of Interior exceeded his authority under the Flood Control Act of 1944 by entering into a contract with a pipeline project to allow the pipeline to withdraw water from a reservoir without the approval of the Secretary of the Army. This Court found that the Flood Control Act "clearly states that the Interior Secretary's authority is subordinate to that of the Army Secretary" and that, based upon the specific statutory provisions and the general background of the Act, "it is beyond question that the Interior Secretary does not possess the authority that is claimed in this case . . . ." *ETSI*, 108 S. Ct. at 811. Moreover, an item in the legislative history was found to put "entirely to rest" the Interior Secretary's argument to the contrary. *Id.* at 814. The Court even found the substance of the Interior Secretary's position to be "difficult to fathom." *Id.* at 816. Under all of those circumstances peculiar to *ETSI*, and distinct from those at bar, Step One of the *Chevron* analysis was, quite appropriately, " 'the end of the matter'." *Id.* at 817 (quoting *Chevron*, 467 U.S. at 842).

Petitioners' reliance on *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988), is equally inapposite. (Pet. at 11). In *Pittston*, the issue before the Court was whether an interim regulation promulgated by the Secretary of Labor that accorded a presumptive claim of entitlement

to benefits only to miners who had ten years of experience and could satisfy one of several medical requirements, violated a provision of the Black Lung Benefits Reform Act ("BLBRA") which required that "[c]riteria applied by the Secretary of Labor in the case of . . . any claim . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2). An interim HEW regulation in effect on June 30, 1973 provided that a miner could establish a presumptive entitlement to benefits if he submitted medical evidence and showed *either* ten years of mining service *or* that his impairment arose out of his coal mining employment. While the Secretary of Labor maintained that the word "criteria" in the BLBRA was ambiguous, this Court disagreed, finding that the Secretary, by denying a claimant the opportunity to obtain the presumptive entitlement by other means in the absence of a ten year history of coal mine employment, plainly had violated the statutory prohibition against criteria more restrictive than that applicable to a claim filed on June 30, 1973. This Court went so far as to say that "[n]o other view of the matter accords with . . . reality" and that "the statute simply will not bear the meaning the Secretary has adopted." *Pittston*, 109 S. Ct. at 420.

In the case at bar, unlike the situation present in *Pittston*, no such clarity and certainty attaches to the language of Exemption D. Indeed, it is most probable that Congress did not even consider the precise question at issue. In *Pittston*, by contrast, it could hardly be said that Congress had not directly addressed the question presented.

At best, the situation which faced the D.C. Circuit could be compared with that in *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), where ambiguity in the statutory language existed, at least in part, because Congress failed to use the language in such a way as to make its intent clear. In *Young*, Congress'

use of a dangling participle in 21 U.S.C. § 346 made the statute admit of either respondents' or petitioners' reading of the statute. *Young*, 476 U.S. at 980.[8] Similarly, in the case at bar, the provisions of the BHCA admittedly are "notoriously difficult to understand because the draftsmen at different times and in different clauses seemed to focus their attention alternatively and sometimes simultaneously on the initiating or acquiring company, on the one hand, and the acquired companies, on the other, without being careful to avoid confusion." (Pet. at 58a).

In *Young*, the Court found that Congress spoke directly to the precise question at issue, even if it did so ambiguously. *See Young*, 476 U.S. at 980. By comparison, in the case at bar, the D.C. Circuit concluded that when Congress wrote Exemption D, "they were focusing on the creation of grandfather rights and not really thinking about what would happen to those rights if the grandfathered company were acquired." (Pet. at 58a). Thus, not only is the statutory language in Exemption D facially ambiguous, but, unlike the situation presented in *Young*, there is no evidence that Congress spoke directly to the precise question at issue.[9]

The very language of the parenthetical contained in Exemption D [10] that Petitioners claim demonstrates clear

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[8] The decision in *Young* was referenced by the D.C. Circuit in support of its conclusion that Congress had not addressed directly the precise question at issue. *See* Pet. at 12a, 15a. Notwithstanding Petitioners' arguments to the contrary (Pet. at 11 n.6), the statute at issue here is as "facially ambiguous"—if not more so—than the language at issue in *Young*.

[9] For similar reasons, Petitioners' reliance on *Bethesda Hospital Ass'n v. Bowen*, 108 S.Ct. 1255 (1988), also is misplaced. (Pet. at 10-11). In *Bowen*, unlike the language at issue, the statutory language was held to be "plain." *Id.* at 1258.

[10] The parenthetical in Section 4(c)(8)(D) provides as follows:

> (for purposes of this subparagraph, activities engaged in or approved by the Board on May 1, 1982, shall include activities

Congressional intent on the precise question at issue (*See* Pet. at 8-9 n.4) actually supports an entirely different reading. Indeed, if, as Petitioners claim, "the bank holding company" refers only to a bank holding company "engaged in insurance activity on May 1, 1982" (Pet. at 3, 7-8 n.3), then "such company" in the Exemption D parenthetical presumably refers to that same grandfathered bank holding company. Accordingly, the inclusion in grandfathered rights "of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of *another* company engaged in such activities at the time of the acquisition" (emphasis added), sets forth what happens when a qualifying grandfathered bank holding company contracts to purchase another grandfathered bank holding company. It says nothing, however, about what happens when a non-grandfathered bank holding company acquires a grandfathered bank holding company—the precise question at issue. *See* Pet. at 12a-13a.

As evidenced by the discussion herein, there exist varying rational explanations and interpretations for provisions which are "notoriously difficult to understand" (Pet. at 58a). Moreover, as the D.C. Circuit found, interpretation of the BCHA's confusing statutory language is not aided by a legislative history which provides a definite or clear resolution to the issue—"*whether* Congress *intended* that grandfather rights should survive an acquisition." (Pet. at 14a-15a). While Petitioners may disagree with the court's finding of silence or ambiguity in the statute, the Petition nevertheless should be denied because the opinion of the D.C. Circuit supports the con-

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carried on subsequent to that date as the result of an application to engage in such activities pending on May 1, 1982, and approved subsequent to that date or of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition).

12 U.S.C. § 1843(c)(8)(D).

clusion that the court understood and discharged its *Chevron* Step One obligation.

II. The Courts of Appeals Have Not Demonstrated Confusion as to Their *Chevron* Responsibilities.

Petitioners would have this Court believe that the courts of appeals throughout the nation are mired in a sea of confusion—that *Chevron* responsibilities are widely misunderstood and misapplied. Worse yet, Petitioners suggest that the matter has attained constitutional proportions, threatening our very system of separation of powers.

In truth, however, the courts of appeals are properly discharging their obligations under *Chevron*, not abdicating their authority and duty to interpret the law. It is only Petitioners' strained reading of recent circuit court cases that suggests that something is amiss.

In *Lehman v. Burnley*, 866 F.2d 33 (2d Cir. 1989), for example, it can hardly be said, as Petitioners contend, that the Second Circuit simply "brushed over Step One" (Pet. at 12) in considering whether the phrase "State amounts expended" in the Recreational Boating Safety Act includes expenditures by local governments for federal matching grant fund purposes. Petitioners' statement that "the Court made no real effort to 'try to determine Congressional intent, using 'traditional tools of statutory construction.'" (Pet. at 12 quoting *United Food*, 108 S. Ct. at 421), is wholly contrary to the obvious analysis undertaken by the Second Circuit as evidenced by Petitioners' own discussion of the decision. (*See* Pet. at 13).

In *Lehman*, the Second Circuit first acknowledged that "'the starting point for interpreting a statute is the language of the statute itself.'" 866 F.2d at 36 (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Finding no express definition of "State" in the Act itself, the court appro-

priately went on to consider the broader statutory scheme, observing that the Act is part of Title 46 of the United States Code which governs shipping. Accordingly, it applied the general definition of "State" found in Title 46 which did not include local governments. Moreover, the court's review of the Act revealed that local governments were mentioned only once therein and then only in a context unrelated to federal matching grant funds. This prompted the court to conclude that when Congress desired to refer to local governments it knew how to do so and, accordingly, that Congress could have expressly included local government expenditures in "State amounts expended" if that were its intention. *Lehman*, 866 F.2d at 36 (citing *GTE Sylvania*, 447 U.S. at 109). The Second Circuit then determined—in view of the Congressional intent clearly expressed in other parts of the Act—that the Secretary's interpretation to allocate funds only to state governments was reasonable.[11]

Petitioners' analysis of *Diamond Shamrock Exploration Corp. v. Hodel*, 853 F.2d 1159 (5th Cir. 1988), represents a similarly tortured attempt to demonstrate confusion on the part of the court. In *Diamond Shamrock*, the Fifth Circuit applied the *Chevron* analysis in perhaps its purest form. The court correctly concluded, at the outset, that the statute in question, 43 U.S.C. § 1337(b), did not "even remotely address the precise question of whether royalties may be collected on take-or-pay payments" under natural gas contracts. *Diamond Shamrock*, 853 F.2d at 1165. Citing *Chevron*, the court acknowledged its duty to determine "whether the agency's interpretation is based on a permissible construction of the statute." *Id.* (citing *Chevron*, 467 U.S. at 843). In reaching that determina-

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[11] Given the Second Circuit's analysis of Congressional intent, it cannot be argued, as Petitioners do here, that the Second Circuit "brushed over" Step One. (Pet. at 12). Indeed, the Second Circuit merely concluded that the Secretary's determination was a reasonable one in light of the intended objective of Congress.

tion, the court considered the language of the lease as well as relevant statutes and regulations which it found did not answer the precise question at issue, but did illustrate why the agency's interpretation was impermissible. Moreover, far from allowing itself to become a "handmaiden of the agency," (Pet. at 14), the Fifth Circuit, having construed the statute, refused to defer to the agency's interpretation.[12]

The decisions cited by Petitioners do not support their position at all. Indeed, it is the Petitioners who appear to be confused rather than the various courts of appeals.[13] In each of the decisions cited by Petitioners, the courts engaged in a proper *Chevron* Step One analysis and only considered the agency's interpretation after it was determined that the statute did not address the precise question at issue.[14] Most importantly, the D.C. Circuit has

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[12] Again, Petitioners attempt to mislead this Court by arguing that the Fifth Circuit's own analysis demonstrated the plain and unambiguous meaning of the statute at issue in *Diamond Shamrock*. (Pet. at 13). A review of the decision, however, reveals that the court's determination was based on a "complete reading of all the relevant statutes, regulations and lease provisions." *Diamond Shamrock*, 853 F.2d at 1159.

[13] Moreover, Petitioners again appear to be expressing dissatisfaction with the substantive determinations of the courts of appeals that precise issues could not be determined from the face of the statute or from the accompanying legislative history. Whether or not Petitioners agree with these substantive findings, it is obvious that the courts understand their responsibility to perform *Chevron* Step One and engage in the requisite analysis.

[14] The decision in *Puerto Rico Maritime Shipping Authority v. Valley Freight Systems*, 856 F.2d 546 (3d Cir. 1988), also relied upon by Petitioners (Pet. at 12), is not to the contrary. Rather, the court recognized its obligation under *Chevron* Step One, stating "[w]hen Congress has not directly and unambiguously addressed the precise question at issue, a court must accept the interpretation set forth by the agency so long as it is a reasonable one." *Id.* at 552. Accordingly, the court then engaged in the analysis required by *Chevron* Step One, stating "[i]t is plain that Congress

given no indication in the decision at issue here that it is "confused" concerning the point at which it should defer to an agency's interpretation of a statute.

III. The D.C. Circuit's Analysis Preserves the Allocation of Responsibility Between the Court and the Agency.

It is, of course, the judiciary which bears "the ultimate responsibility for interpreting the laws of this land." (Pet. at 14). Moreover, as Petitioners note, administrative constructions which are contrary to clear Congressional intent must be rejected. *Id.* The *Chevron* analysis, however, necessarily begins with the determination "whether Congress has directly spoken to the *precise question at issue.*" *Chevron*, 467 U.S. at 842 (emphasis added).

In the case at bar, if Congress had intended to address the precise question of whether a bank holding company that qualifies for Exemption D rights may be acquired by another bank holding company without losing those rights, it failed to make its intent clear. At best, Exemption D is ambiguous in that regard; at worst, it is silent. It is this gap, whether left explicitly or implicitly by Congress, which the Board was empowered to fill in a reasonable and permissible manner.[15]

Notwithstanding Petitioners' suggestion to the contrary, the separation of powers that "lies at the heart of our constitutional system" (Pet. at 14) is hardly imperiled by the D.C. Circuit's decision at bar. None of the cases cited by Petitioners evidences "a dangerous trend

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has not addressed the question of whether motor-carrier service of the type at issue here is within ICC jurisdiction. This is hardly surprising in view of the extremely fact-specific nature of the problem." *Id.*

[15] Focused as they are upon a perceived threat to the province of the judiciary, Petitioners have perhaps forgotten that *Chevron* itself cautions *courts* as to the limits of their role in our constitutional system. *See Chevron*, 467 U.S. at 865-66.

* * * completely at odds with the Court's directives * * *." (Pet. at 15). Indeed, the D.C. Circuit fully complied with the dictates of *Chevron*. After engaging in a complete *Chevron* Step One analysis, and upon finding ambiguity or silence with respect to the precise question at issue, the court further reinforced the principle of separation of powers by deferring to the Board's interpretation which it found to be reasonable and permissible.

Petitioners may, for obvious reasons, protest the D.C. Circuit's decision. The court's analysis, however, was proper. Certiorari does not lie to assist petitioners who posit confusion below or among the circuits where, in fact, none exists.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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